

Statement of James M. Seif
Vice President-Corporate Relations
PPL Corporation
on
Brownfields and the Fifty States: Are State Incentive Programs Capable of Solving
America's Brownfield Problem?
before the
U.S. House Committee on Government Reform,
Subcommittee on Federalism and the Census
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Lehigh University
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Good Morning, Mr. Chairman and Members of the Subcommittee.

I thank you for asking me to join you today as you visit the Lehigh Valley. PPL is a Fortune 500 electric energy company and has been in the Valley since its founding in 1920. PPL is proud of both its environmental and economic development achievements. Like many others, we have benefited from, and provided benefits to, the successful Pennsylvania Brownfields Program, and as Governor Tom Ridge's Secretary of the Department of Environmental Protection (DEP) at the time it was started, I am happy to be here to provide whatever perspective that it has given me.

PPL and I especially thank Congressman Charlie Dent, who as a State Representative and later a State Senator, had a hand in our success.

SETTING THE STAGE – SUPERFUND

When President Jimmy Carter signed the Comprehensive Environmental Response Compensation Liability Act (Superfund) in December 1980, he declared that the law, and its \$1.6 billion appropriation, would finally solve the problem of abandoned, polluted industrial sites in America.

It was not about to "finally solve" the problem of such sites, and indeed it caused a few problems of its own. The sheer number of sites, their scientific and technical complexity, the enormous costs of many individual sites, plus a rocky start at EPA on setting up the administrative machinery, were just the beginning of a twenty-five year saga.

Even if the underlying environmental situation had been correctly estimated by the Congress and President Carter in those early days, problems with the Act itself began to get in the way. At the outset, its exclusion of contamination caused by petroleum products created a much resented unfairness in listing sites and fixing responsibility on the polluters. Moreover, the strict joint and several liability approach meant that a very

small contributor to a given site's problems would be assessed the lion's share of the cleanup cost if it had the deepest pocket, or was the only party still viable. Court decisions upheld the EPA's right to fix the problem on its own, and then send the bill. An order to a company to do the cleanup, or take other measures, could not be appealed to a court until after the action was taken. Disputes over the cleanup standard at a given site ("How clean is clean?") covered new ground in medicine, chemistry and geology, and we all know now how slowly that ground was covered. And risk management, sometimes inaccurately called a science, is really a societal decision, and one that can also take a while to sort out.

During this first decade of Superfund's operation, the states were not significant players. They lacked the administrative machinery and the budgets to tackle even one of the hundreds of huge sites that were getting listed as Superfund sites. In any case, the states were involved in their own mostly successful efforts to gain delegation from EPA of their large and complicated responsibilities under the federal Clean Air Act and the Clean Water Act. Some of them, including Pennsylvania, did pass cleanup laws that had Superfund-like provisions, but it was their emergency response tools that got the most use.

These circumstances surrounding Superfund produced several results: A whole generation of litigators and consultants cut their teeth on fighting Potentially Responsible Party (PRP) designations and cleanup orders on sites with hundreds of parties, and they got pretty good at it. Legal costs soared, but given the stakes, fighting was a rational approach by the companies, municipalities, federal agencies and even individuals that came under Superfund's purview. Some anomalous situations — orders to parties to clean up waste sites to which they had actually been ordered by a state, decades ago, to send the wastes — were not uncommon. High school auditoriums were rented for meetings of the parties pulled in by EPA, joined by many other parties pulled in by original parties, ad nauseam.

I remember one low point in my own legal career. In 1993 I represented a very fine client, National Cash Register of Dayton, Ohio, in a Superfund site — essentially an old town dump, in York, PA. I spent a whole day, with two EPA lawyers and several other lawyers to other parties, interviewing retirees about how many empty cans of printing ink they might have loaded on trucks in the seventies. This was a lot of expensive talent in search of needles in haystacks, and debating about whether red ink or blue ink had any of the chemicals later found in the dump. Meanwhile of course, the site festered.

The worst problem of Superfund, of course, was the small number of completed cleanups and the enormous administrative, litigation and cleanup costs at those sites both to parties and taxpayers. Moreover, sites that might not have "scored" high enough for Superfund designation nonetheless became "legally toxic;" no party would attempt a cleanup, or become a tenant, let alone purchase, any site that had any possibility of environmental issues. Capital fled, because it cannot take unquantifiable risks, or wait unknown amounts of time, to realize on its investments. Capital will not even invest in new cleanup technology if it takes courts years to define the very meaning of the word

"cleanup," especially when some in the community argued that cleanup had to mean every last molecule. There was even a court case — inevitably brought on by EPA's and the PRP's relentless search for others to share cleanup costs — that held some lenders and financial institutions were responsible for sites as "operators." Add all of this to the underlying problems of many urban communities that were escalating in those years — crime and educational underperformance, for example — and little wonder that greenfield development was the clear choice. Especially in states with a strong industrial heritage, the barbed wire that ringed old dumps and industrial parcels was reinforced by Superfund, not removed; the parcel turned into a blight, and the pollutants stayed put.

ANOTHER PATH

Some other approach had to be tried, and in Pennsylvania, it was. In 1993 and 1994, the Pennsylvania Senate Environment Resources and Energy Committee, led by Senator Chip Brightbill of Lebanon County, and Senator Ray Musto of Luzerne County, its Republican and Democratic Chairmen, began a series of hearings to see why the cleanup pipeline was so jammed. They eventually drafted three bills which became Pennsylvania's Land Recycling Programs. (Act 2 was the clean up procedure; Act 3 protected lenders, and Act 4 provided funds.) They were signed by Governor Tom Ridge in the summer of 1995 at an abandoned steel mill in McKeesport, PA — a site whose last assignment had been to make bomb casings for the Vietnam War. Later, this land came under the new law's provisions, and it now houses 1200 jobs in light manufacturing and service work for a satellite television dish manufacturer.

Current Pennsylvania DEP Secretary Katie McGinty has described for this Committee the current operation of the law in PA, and Deputy Secretary Gene DePasquale joins us today for an update, so I need not do that now. I would alert the Committee, however, that behind all the amazing statistics about two thousand cleaned up sites, many, many thousands of jobs and millions of dollars of investment, lie two powerful "enablers" for all the action:

- There was a way to define and achieve realistic cleanup standards, and
- There was a piece of paper at the end which you could take to the bank.

If you know what the cleanup will cost, (even if it is more than the value of the land,) and if you know when it will end, a property once untouchable can once again have the economic value that its location, its owners, its investors and its community are willing to give it. It is once again in the market as a commercial asset, not a black hole of pollutants, scientific puzzles and litigation. We learned from Superfund that it's awfully hard to "enforce" cleanups, and from the PA approach that it's a lot more productive to invite and incent them.

We also had lot of help. Contrast the corps of superfund litigators, working hard to slow down the operation of that law, with the current group of lawyers, developers, accountants, engineers, redevelopment authorities, and community activists who are doing their best to make brownfield laws work even better.

Needless to say, Secretary McGinty can be proud of the law's continuing vitality, and Secretary David Hess, her predecessor and the man who wrote the law as staff to the Senate Committee, and then implemented it as my Deputy Secretary at DEP, and I, are all very proud of the way it works today. An environmental regulatory agency like DEP must always have a hammer when it needs one, but it can also be transformed into a genuine, full service environmental department, with a lot more tools available, if it learns how to make partners and enlist community entrepreneurial spirit in the service of its mission. The men and women at the PA DEP have proven that, and their work was recognized in 1997 by the Ford Foundation and Harvard University's award for one of the ten most innovative government programs of that year. Perhaps an even better indicator – if imitation is a measure of success – is that Pennsylvania's recipe has now been copied by over forty other states and countries.

A NEW TOOL BOX

Some of the new tools came from outside the Land Recycling Program, in the form of broader trends. A growing realization that the economy and the environment were not in conflict – the sustainability paradigm – was taking hold, and people could see that a cleaned up site was "green" in both senses of the word. Growing recognition that open space, clean air and water, and historical context have real economic value also began to constrain some greenfield development, and that put extra value on brownfields closer to the community center. Some cities began, ever so slowly, to gain population and that in turn fostered new development. Political leaders, for example Mayor Tom Murphy in Pittsburgh and then-Mayor Ed Rendell in Philadelphia, saw immediately the possibilities and got to work with their own programs. Mayor Murphy even bought two major sites while the regulations were still in draft, and they are now residential and business developments — the first in that city, my home town, for quite a while. Cleanup technology and techniques also began to get standardized and sanctioned in enforcement agreements and contracts. And a good economy in the nineties boosted all of these trends.

But beyond these external developments, the program itself was responsible for much of its own success. At the outset, we recognized that the specific elements of the law, the regulations and the administrative techniques, were not all that new or complicated. Each of them had antecedents in other commercial, economic development and environmental laws. Like Henry Ford — who is incorrectly called the inventor of the automobile — all we did was to use existing techniques in new combinations, and then we standardized them and went to the public to sell the product. We advertised, we did training, we gave countless speeches, we touted the early sites, praised the initiatives that brought them back to the community, and put real money behind them. We performed our administrative tasks and rulemaking on time, and even issued a "money back guarantee" on timely issuance of related permit applications. We were careful about quality assurance and quality control, because we were, after all, dealing in some cases with genuinely toxic pollutants. The state Department of Community and Economic Development wedded the program to many of its own initiatives, and began to actually sell sites to developers around the state and nation. It still is.

We also have a tool called the Keystone Opportunity Zone in Pennsylvania. It is a tax free zone in an urban area that spurs much needed redevelopment. Our own new headquarters building is on one in Allentown, and we once again thank Representative Dent for developing that idea in the State Senate, and for helping us with that site.

We worked hard with the EPA regional office (and they with us) to see that Superfund actions did not interfere with our program, and so that other federal programs, like the Resource Conservation and Recovery Act, did not "chill" any cleanups.

LESSONS AND SOME CURRENT DEVELOPMENTS

We learned a lot. We learned again the power of private capital, the accuracy of private risk assessments, the strength of community spirit once awakened, and a few history lessons as well. Superfund and some environmental scare-mongering had created a popular perception that under every old site was a toxic soup of chemical and poisons. In fact, once cleanups became a realistic prospect, and owners and other interested parties began to find it worthwhile to actually learn about what was there, we found, in many cases — not much! The contamination was manageable. Maybe our hardworking industrial forebears were more fastidious than we had thought. Demystifying the cleanup process brings out some good old "can do" spirit, and some cash, and it works. We also got away from the pristine, "clean it up to background" mantra. Some sites can in fact be capped and the risk is well below any acceptable level and the benefits are substantial. I know of one cap that is 18 inches of triple reinforced concrete; pretty expensive as an environmental cap, but then it also serves as the commuter plane runway at the Philadelphia International Airport.

We also learned that old factories don't have to become new factories. They can be factories, warehouses, homes, stores, offices, or parks. It is especially nice to see some great Pennsylvania architecture restored for new uses. The Bethlehem Steel site, which I understand is one of the largest brownfield sites in America, will have a Smithsonian museum, a hockey rink, and many other attractions.

We did hear an occasional complaint from those fighting a rearguard action in favor of punitive approaches. They said that some sites had not been adequately cleaned up in Pennsylvania. My response each time was to ask which sites, and promise to go back and do it right. I am still waiting to hear.

One recent reinforcing development for cleanups has been a new accounting standard. A March 2005 rule by the Federal Accounting Standards Board (Interpretation Number 47,) requires the accurate characterization of all assets on the books. Property suspected of contamination cannot just be listed for its book value, while its owners play "see-no-evil." You have to go get the facts, and share them with your investors. This is simply a good rule of transparency and disclosure, and it calls to mind an interesting development in Pennsylvania's brownfield experience.

This important innovation under our law came early. A large Pennsylvania utility approached DEP and said it had quite a few sites, and wanted to do a package deal. DEP and the utility negotiated a schedule for assessing the sites, addressing the important ones first, adding new ones, and setting schedules. It then began work on 134 identified sites. We recently celebrated the ten-year anniversary of that agreement, which now encompasses hundreds more sites. I say “we” because the company was PPL. Even more interesting, the Penn Fuel Gas Company later approached us for a multi-site agreement, and a few weeks after it was signed, PPL acquired Penn Fuel. In other words, once the environmental issues had been rendered both quantifiable and transparent, under a law that could solve them, it triggered an acquisition that might never have taken place. Since then, there have been others – BP Oil, the US Defense Department and most recently a 92 site agreement with Jiffy Lube, Pennzoil and others. The old approach, as it was put by Superfund lawyers, was “Let’s hide in the weeds.” The new approach may be, “Git’er done!”

FUTURE STEPS

It is tempting for current and former state officials to say the federal government should “just get out of the way,” but I can tell you as a former federal official – EPA Regional Administrator in Philadelphia – that’s simply not fair. For all its problems, Superfund must stand ready for emergency response and for the really huge sites that may be out of reach of private capital and state powers. The 2002 Amendments (promised by Candidate Bush in Alliquippa, PA in July 2000 and signed by President Bush in Conshohocken, PA, at Pennsylvania’s 1000th clean up in 2002) have also strengthened the EPA’s capacity to be a partner and not the occasional bully it had become. Its assistance to Pennsylvania under those amendments has been a great help. Of course, Superfund must be managed to minimize interference with successful state programs, and to not scare capital from potential cleanup investments. One idea might be to permit the state to veto the listing of a site on the Superfund list, if it wished to tackle the site itself. States can act more quickly.

The federal government can also invest in cleanup technology, including cleaner fuels, and it can assure that its own house is in order. Some of the last two decades’ biggest state federal disputes have been where the federal government, or one of its contractors, has been a responsible party at a Superfund site. And the Resource Conservation and Recovery Act, which was written to prevent future Superfund sites, must be consistently and thoughtfully enforced.

As time goes on, and if the trends in Federalism for which the late Chief Justice Rehnquist is given credit continue, the capacity, willingness and legal authority of states to go their own way will increase. And in deciding important risk management questions, and community planning and infrastructure needs, I think this is as it should be. Large multinationals, PPL among them, do not necessarily welcome this development, but the states’ right to declare that one size does not fit all is not automatically wrong, and the occasional Congressional reflex to solve all problems at a national level may not be always the best approach.

It would also be good idea to work harder on sites that have environmental impairments but whose location or other attributes may not attract enough private cleanup capital. Property that can have good public use as recreational space, a transit center, and so on, should be helped with different incentives than just the standard economic development ones. Perhaps Federal Economic Development Administration funds would be appropriate for these cases.

It would also be wonderful for Pennsylvania to see more action of the sort that Congressman Kanjorski has triggered in Northeast Pennsylvania thorough the Earth Conservancy which he helped found. That is clean up of what we might call grayfields – old coal mining sites. Other laws may need tweaking for that, and a different set of incentives devised, but it's certainly worth looking at, especially in Pennsylvania. We are proud of the work we have done in using river dredge spoil and power plant fly ash to reclaim dangerous old mines. We also look forward, in nearby Schuylkill County, to producing sulfur-free diesel fuel from waste coal piles.

PPL and I thank you again for this opportunity, and I hope I can answer some of your questions.